

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 9 March 2017

Public Authority: Devon County Council
Address: County Hall
Topsham Road
Exeter
EX2 4QD

Decision (including any steps ordered)

1. The complainant has requested information in relation to a specific prosecution by Devon and Somerset Trading Standards. The Commissioner's decision is that Devon County Council has correctly applied the exemption at section 30(1)(a) of the FOIA where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence or whether a person charged with an offence is guilty of it. The Commissioner does not require any steps to be taken.

Request and response

2. On 1 November 2015 the complainant wrote to Devon County Council ('the council') and requested information in the following terms:

"In October 2015, [name and address redacted] appeared at Exeter Crown Court in respect of a prosecution brought by Devon and Somerset Trading Standards.

With regard to the above and in line with the provisions in the Freedom of Information Act, I am making the following requests for information please:

- i) copies of all Devon and Somerset Trading Standards meeting minutes, decision and/or action logs, and all emails sent by and/or received by [name redacted], relating to the aforementioned

investigation

ii) copies of all internal performance targets and performance measures that Devon and Somerset Trading Standards officers work to, including any performance targets that were in place in relation to the aforementioned investigation”.

3. The council responded on 30 November 2015 (reference no. 3903596) In relation to part i), it refused to provide the information requested citing the exemptions at sections 44, 40(2) and 30 of the FOIA. In relation to part ii), it provided narrative information and a link to information on its website.
4. On 6 December 2015 the complainant requested an internal review regarding the decision and complained about the time taken to be provided with a response.
5. In response to an email from the Head of Trading Standards, the complainant provided the council's Trading Standards department with a consent form from the defendant in the court case which contained his permission for the release of data to the complainant.
6. On 2 February 2016, the council informed the complainant that it would consider the matter as a separate request for information.
7. The council then provided another response on 22 February 2016 2016 (reference no. 4273496). It refused to provide the information requested citing the exemption at section 30(1)(a) of the FOIA.
8. On 11 May 2016 the council provided an internal review response (reference no 4273496) in which it maintained its reliance on the exemption at section 30(1)(a) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 27 February 2016 to complain about the way his request for information had been handled.
 10. The Commissioner has considered the application of the exemption in relation to investigations and proceedings conducted by public authorities at section 30(1)(a) of the FOIA.
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Reasons for decision

Section 30 - Investigations and proceedings conducted by public authorities

11. Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence

(ii) whether a person charged with an offence is guilty of it”.

12. As explained in the Commissioner’s guidance on ‘Investigations and proceedings (section 30)’¹, section 30(1)(a) can only be claimed by a public authority that has a *duty* to investigate offences. A duty imposes an obligation to carry out the investigations as opposed to a discretionary power to do so. A public authority will need to demonstrate how the duty relevant to a case has arisen. This will usually be by statute. A public authority will also need to explain not only how the duty to investigate arises but also which offence or offences, usually defined in common law or statute, are relevant in the particular circumstances. A public authority must be able to demonstrate that the investigation has been conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it.

13. The council has explained that the withheld information in this case relates to an investigation conducted by the Devon and Somerset Trading Standards service to establish whether the owners of a garage in Exeter were guilty of offences under the Consumer Protection legislation including the Consumer Protection from Unfair Trading Regulations 2008 and the General Product Safety Regulations 2005. It said that the information in question constitutes correspondence entered into by the investigating officer as part of this investigation and internal departmental records. It further explained that where meeting the test

¹ <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

for “relevancy” under the Criminal Procedures and Investigations Act, the existence of the material was disclosed to the defence as “unused material” as part of the prosecution’s duties of disclosure, but was not otherwise dealt with in court and is therefore not a matter of public record.

14. The council has confirmed that it was under a duty to undertake the investigation in accordance with the Consumer Protection from Unfair Trading regulations 2008, regulation 19 (duty to enforce) and the General Product Safety Regulations 2005, regulation 10 (duty to enforce). The Commissioner understands that the offences were brought under regulation 6 of the Consumer Protection from Unfair Trading regulations 2008, misleading omission, and regulation 8(1)(a) of the General Product Safety Regulations 2005, supply of an unsafe product (in this case the sale of an unsafe vehicle), and that the matter was heard in court in October 2015.
15. Due to the phrase ‘at any time’, the Commissioner considers that is irrelevant for the application of section 30(1)(a) that the investigation was complete at the time of the request, merely whether the information was held at some point for the purposes of the investigations.
16. As section 30(1)(a) is a class-based exemption it is not necessary for the council to demonstrate that disclosure would prejudice any particular interest in order to engage the exemption.
17. Taking the above into consideration, the Commissioner is satisfied that that the information requested was held as part of an investigation being conducted by the council, which the council was under a duty to conduct. She therefore considers the section 30(1)(a) exemption to be engaged in respect of all the withheld information.

The public interest test

18. As section 30(1)(a) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the FOIA. This favours disclosure unless;

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”.

19. The starting point is to focus on the purpose of the relevant exemption. With section 30(1)(b) this involves weighing the prejudice that may be caused to an investigation or prosecution, or more generally to the investigatory and prosecution processes of the public authority, against

the public interest in disclosure. There is general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of criminal matters.

Public interest arguments in favour of disclosing the requested information

20. The Commissioner is mindful of the public interest in promoting openness and transparency in the discharge of a public authority's statutory functions. For example, disclosure of the requested information may enable the public to understand why a particular investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out. In this case, disclosure would ensure that the council is held to account for this particular investigation into the sale of an unsafe vehicle.
21. The council said that in favour of disclosing the information it considered the public interest in openness and transparency and the public interest in furthering public debate on the matter of carrying out criminal investigations.
22. The complainant said that the case in question has been heard in open court, and therefore is in the public domain and indeed has been reported upon by the media. He said that the request refers to a legal process that has been concluded through the criminal justice process and as the council has not been notified of any intention to appeal since that conclusion, stating that disclosure would compromise effective investigation or prosecution is unjustifiable.
23. The complainant also said that the purpose of his request is around the efficacy of Trading Standards' management and decision-making practices in respect of this particular case and that the release of information is therefore vital if, as a taxpayer, he is able to scrutinise the way the council has operated and to hold it to account.

Public interest arguments in favour of maintaining the exemption

24. The council submitted the following arguments in favour of maintaining the exemption:
 - The public interest in ensuring that offences are effectively investigated and where appropriate prosecuted.
 - The public interest in ensuring that information that might enable offenders to deduce investigation methodologies is not disclosed to the detriment of future investigations.

- The public interest in ensuring that the adequacy of records retained concerning investigations are not prejudiced by officers carrying out a criminal investigation being discouraged from placing correspondence in writing out of fear that the information may be disclosed into the public domain in response to a request.
25. The Commissioner notes that section 30 is concerned primarily with preserving the integrity of certain proceedings and investigations which public authorities have the power or duty to conduct and therefore recognises that there is an inherent public interest in ensuring the ability of public authorities to carry out investigations.

Balance of the public interest arguments

26. The council said that any public interest in openness and transparency that might result from disclosure of this information is reduced by the fact that the case which was the subject of this investigation was heard in court and therefore the public interest in openness and transparency would be best served through the public consumption of court information.
27. It also said that disclosure of the investigation correspondence would do little to inform public debate on the effectiveness of Trading Standards investigations. It explained that public debate is enhanced to a greater extent through public scrutiny of information supplied through the court process as not only is this information placed into context, but is also balanced against evidence submitted for both the prosecution and defence.
28. In relation to the complainant's argument that the case has been heard in open court and that the legal process has been concluded, the Commissioner considers that once proceedings have concluded, the public interest in maintaining the exemption may wane. However, information does not necessarily lose its relevance even though an investigation was concluded at the time of the request. She does not believe that in all circumstances the older the information is the less risk of prejudice there is. There is always the possibility that the status of an investigation can change over time and that information has the potential of becoming relevant again.
29. With regards to the complainant's argument that the purpose of the request is around the efficacy of Trading Standards' management and decision-making practices in respect of this particular case, the Commissioner notes the council's position regarding the public consumption of court information. However, she is mindful that the withheld information extends further than material used in court and is

therefore not a matter of public record. Therefore, the withheld information would add to the public's understanding of the actions of Devon and Somerset Trading Standards in respect of this particular investigation. Disclosure of the information would also ensure that the council is held to account for this particular investigation. In view of this the Commissioner considers that the arguments in favour of releasing the withheld information deserve some weight.

30. However, the Commissioner also notes that general information relating to the methods engaged by Devon and Somerset Trading Standards in seeking compliance with relevant legislation is in the public domain, on Devon and Somerset Trading Standards website, which goes some way to addressing the public interest in ensuring transparency and accountability.
31. The council has submitted arguments in favour of maintaining the exemption which focus on the protection of the investigatory and prosecution processes of the council rather than the protection of a specific investigation or prosecution. There is public interest in a matter such as the sale of an unsafe vehicle being investigated as thoroughly and efficiently as possible and in prosecutions not being prejudiced by the disclosure of information under the FOIA. It is important for public confidence in the activities of the council that its ability to discharge its statutory functions should be effective and unimpeded.
32. With regards to the council's argument that disclosure may lead to less detail being recorded in case records which would be to the detriment of the wider investigation process, the Commissioner is not convinced that investigating officers would be discouraged from placing correspondence in writing but it is not unreasonable to consider that information could be less descriptive and couched in a more cautious manner.
33. Having taken all of the above into consideration, the Commissioner considers that there is considerable public interest in matters such as the sale of an unsafe vehicle being investigated thoroughly and efficiently ensuring that the best evidence is available to the council to inform its decisions. It is important for public confidence in the activities of the council that its ability to discharge its statutory functions should be effective and unimpeded. The Commissioner appreciates that disclosure would hold the council to account for this particular investigation but she has not been made aware of any allegations of wrongdoing in this case. There will be cases where the balance of public interest will run in favour of disclosure but the Commissioner is not satisfied that this is such a case. In all the circumstances of this case, taking full account of Trading Standards need to be able to effectively discharge its investigatory functions, the Commissioner is of the view that the public interest in maintaining the exemption outweighs the

public interest in disclosing the requested information. She therefore finds that the council was entitled to withhold the requested information under section 30(1)(a).

Right of appeal

34. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Deborah Clark
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